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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

RELIGIOUS TECHNOLOGY CENTER, a California corporation, and CHURCH OF SCIENTOLOGY INTERNATIONAL, INC., a California corporation,

Petitioners,

vs.

LARRY WOLLERSHEIM, an individual; DEDE REISDORF, an individual; RICHARD OFSHE, an individual; MARGARET SINGER, an individual; HARVEY HABER, an individual; CHARLES B. O'REILLY, an individual, LETA SCHLOSSER, an individual; GREENE, O'REILLY, BROILLET, PAUL, SIMON, McMILLAN, WHEELER and ROSENBERG, a California corporation; and DOES 1 through 100, inclusive,

Defendants,

JON ZEGEL, an individual; DAVID MAYO, an individual; CHURCH OF THE NEW CIVILIZATION (dba ADVANCED ABILITY CENTER), a California corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a private plaintiff entitled to equitable relief under the civil remedy provisions of the Racketeer Influenced and Corrupt Organization Act (18 U.S.C. §1964).

2. Can religious materials constitute a protectable trade secret under the provisions of the California Trade Secrets Act (Cal. Civ. Code §3426.1(d)).

3. Does the Ninth Circuit's denial to Petitioners the protection afforded by the California Trade Secrets Act (Cal. Civil Code §3426) merely because of Petitioners' status as religious entities violate the provisions of the First, Fifth and Fourteenth Amendments to the United States Constitution.

RULE 28.1 LIST

Counsel of record for Petitioners hereby notifies this Court that all the Missions and Churches of Scientology throughout the world and related corporate entities have an interest in the outcome of this opinion.

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Defendants,

JON ZEGEL, an individual; DAVID MAYO, an individual; CHURCH OF THE NEW CIVILIZATION (dba ADVANCED ABILITY CENTER), a California corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Religious Technology Center and the Church of Scientology International hereby petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit that reversed United States District Court Judge Mariana R. Pfaelzer's issuance of a preliminary injunction based on the Racketeer Influenced and Corrupt Organization Act (18 U.S.C. §1961 et. seq.) and the California Trade Secrets Act (Cal. Civ. Code §3426 et. seq.).

OPINIONS BELOW

The order of the District Court, granting Petitioners their requested preliminary injunction, is set forth in Appendix A, 1. The opinion of the Ninth Circuit Court of Appeals, reversing the grant of the preliminary injunction and

their denial of the petition for rehearing, are set forth in Appendix B, 14.

JURISDICTION

Injunctive relief was granted by the District Court on November 23, 1985, based on Petitioners' claims for violation of the Racketeer Influenced and Corrupt Organization Act (18 U.S.C. §1961 et. seq.) and for violation of the California Trade Secrets Act. (Cal.Civ. Code §3426 et. seq.). The judgment of the Court of Appeals for the Ninth Circuit was entered on August 8, 1986, reversing the grant of preliminary injunctive relief. The Court of Appeals then denied a Petition for Rehearing on October 7, 1986 and this petition for certiorari has been filed within 90 days of that date. This Court has jurisdiction pursuant to the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The specific statutory provisions in question include the civil remedies provision of the Racketeer Influenced and Corrupt Organization Act (18 U.S.C. §1964) and the California Trade Secrets Act (Cal.Civ.Code §3426.1(d)). These statutes are set forth in Appendix C, 83. This action also involves the First, Fifth and Fourteenth Amendments to the United States Constitution. In particular, this action concerns Petitioners' Freedom of Religion, Due Process and Equal Protection rights. These constitutional provisions are set forth in Appendix D, 87.

STATEMENT OF THE CASE

A. Factual Background

This action involves the theft of

Petitioners confidential documents and the subsequent transfer of them to the Defendants in this action.[1/] The District Court, applying neutral principles of law, made an in-camera comparison between the documents in Defendants' possession and the original stolen documents, and found that the Defendants' documents could not have been created without reference to the materials that were stolen from the Petitioners. The District Court stated

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1 On December 9, 1983, Defendants in the consolidated and co-pending action, entitled Religious Technology Center, et al. v. Robin Scott, et al., CV No. 85 711 MRP(Bx), Robin Scott, Ron Lawley and Morag Bellmaine entered the Church of Scientology Advanced Organization, St. Hill, Europe and Africa, located in Copenhagen, Denmark, under false pretenses, introduced themselves as authorized officials of the Church, and took, without consent, numerous copies of Petitioners' confidential materials.

Thereafter, Scott, Lawley, and Bellmaine conspired to transport and sell these stolen confidential materials to [Footnote Cont'd]

that it found the contents of these documents to consist of a methodology that was protectable as a trade secret.

During a two day evidentiary hearing before the District Court, Petitioners established that, as early as 1983, the Defendants unlawfully conspired to misappropriate, use, and threaten to disseminate certain of Petitioners' confidential and proprietary materials; and they did so in furtherance of a common plan and design to possess, use, and disseminate the stolen materials for

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[Footnote 1 Cont'd]
the Defendants in this Petition, The Church of the New Civilization, d/b/a Advanced Ability Center (AAC), Harvey Haber, Jon Zegel, and David Mayo. The District Court was presented with evidence of numerous international phone calls by and between the Defendants on and around the day of the theft in Denmark as well as written memoranda in which negotiations between the Defendants were set forth for the transfer of these stolen documents to the Defendant AAC.

the purpose of obtaining an unfair advantage.

The District Court concluded that a nexus existed between the documents stolen in Denmark and the documents in Defendants' possession and that Defendants' possession, use, and dissemination of Plaintiffs' confidential materials would irreparably injure Petitioners since public dissemination of their confidential materials would render Petitioners forever at a loss to maintain the confidentiality of the materials. Defendants, however, would be merely prohibited from profiting from their ill-gotten gains. Based on the imminent threat, the economic value of the materials, and the prospective advantage those materials confer, injunctive relief was granted on November 23, 1985.

The District Court stated in its

findings: "The Court views this as a stolen documents case, and the theft appears to be as much for economic as for doctrinal reasons." (See, Appendix A, 8)

Thereafter the Respondents appealed the District Court's issuance of the Preliminary Injunction.

In response to a direct inquiry from the Ninth Circuit, the District Court stated that the basis of its injunction was both Petitioners' cause of action for violation of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §1961 et. seq. (hereinafter "RICO") and Petitioners' claim for trade secret misappropriation. (See Appendix A, 9).

B. The Ninth Circuit's Ruling

The Ninth Circuit on August 8, 1986, reversed the issuance of the preliminary

injunction by the District Court. The Court of Appeals held that private litigants are not entitled to injunctive relief under RICO (18 U.S.C. §1964) and that confidential religious materials cannot constitute a protectable trade secret, since the Court viewed the materials as lacking commercial value merely because they were owned by a religious non-profit organization. The Ninth Circuit then denied a Petition for Rehearing with A Suggestion for Rehearing en banc.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has ruled that private plaintiffs are not entitled to injunctive relief under RICO. The ruling of the Court is inconsistent with the plain language of the RICO statute, it's legislative history, it's statutorily

mandated liberal construction, decisions in other circuits, and the thrust of this Court's decision in Sedima, S.P.R.L. v. Imrex Co. Inc., 105 S.Ct. 3275 (1985). It also promises to frustrate Congress' primary objective in enacting RICO: the elimination of organized crime, since district courts will be effectively hamstrung if they can do no more than award money damages, particularly, as here, where victims of crime demonstrate irreparable harm.

Accordingly, based on a conflict of decisions among the circuits on the availability of injunctive relief to private plaintiffs under the RICO Act, and the overall importance of this issue, the Court should grant Certiorari.

Petitioners also seek a Writ of Certiorari to reverse the Ninth Circuit's

first impression ruling that religious materials, merely because they are owned by non-profit religious organizations, are not protectable under the California Trade Secret Act. By refusing to grant a religious organization the same protection afforded all other entities, the Ninth Circuit has denied Petitioners equal protection and due process of the the law in violation of Petitioner's rights under the Fifth and Fourteenth amendments, and has effectively prevented Petitioners' free exercise of their religion in violation of the First Amendment. These are additional issues with potentially far reaching national consequences for all religious and non-profit organizations and is in direct conflict with the ruling of the Fourth Circuit in Purcell v. Summers, 145 F.2d

979 (4th Cir. 1944), which held that:

> [The] principles [of unfair competition] ordinarily applied in the case of business and trading corporations are equally applicable in the case of Churches and other religious and charitable organizations.

Id. at 985.

Accordingly, Petitioners seek a Writ of Certiorari to review this denial of Petitioners' First, Fifth and Fourteenth Amendment Rights.

I.

WHETHER DISTRICT COURTS MAY ISSUE INJUNCTIONS IN CIVIL RICO CASES TO PROTECT PRIVATE PARTIES IS AN IMPORTANT QUESTION OF NATIONAL SIGNIFICANCE

This Court recently recognized in its Sedima decision that the utilization of RICO's civil provisions by victims of patterns of criminal conduct is now "familiar history." 105 S.Ct at 3277-78.

Whether those civil provisions permit or preclude equitable relief for RICO victims is fundamental to RICO's effective functioning. It is, obviously, an issue of national significance.2/

In Sedima, this Court observed that RICO's remedial purposes "...are nowhere more evident than in the

2. The availability of injunctive relief in private RICO suits has been the subject of considerable attention by commentators most of whom reject the suggestion of some courts that the statute denies to the courts the power to grant all forms of needed relief. See, e.g, Belgard, Private Civil RICO Plaintiffs Are Entitled to Equitable Relief Under Sec. 1964(a), 2 RLR 537 (1985); Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 Notre Dame L. Rec. 237, 330-341 (1982); Blakey and Gettings, Racketeer Influenced and Corrupt Organizations (RICO) Basic Concepts - Criminal and Civil Remedies, 53 Temple L.Q., 1009, 1017-21, 1047 (1980); Bridges, Private Litigation Based Upon "Fraud in the Sale of Securities", 18 Ga. L.Rev. 43, 74-77 (1983); Fricano, Civil RICO: In Antitrust Plaintiff's Considerations, [Footnote Cont'd]

provisions of a private action for those injured by racketeering activities." 105 S.Ct. at 3286. Yet, the Ninth Circuit's decision embraces a profoundly restrictive reading of the ability of courts to

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[Footnote 2 Cont'd]
Antitrust Plaintiff's Considerations, 52 Antitrust L.J. 361 (1983); Johnson, Predatory Rights: Multiple Remedies for Wall Street Sharks under the Securities Law and RICO, 10 J. of Corp. L. 3, 62-76 (1984); Long, Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action, 85 Dick L. Rev. 201, 205 (1981); Note, The Availability of Equitable Relief in Civil Causes of Action in RICO, 59 Notre Dame L. Rev. 945 (1984); Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101 (1982); Strafer, Massumi, Skolnick, Civil RICO in the Public Interest: "Everybody's Darling", 19 Am. Crim. L. Rev. 655, 709-715 (1982); Weissman, In the High Stakes Game of Civil RICO, Can Private Claimants Raise the Ante Even Further With Claims for Equitable Relief?, 1 RLR 234 (1984); Wexler, Civil RICO Comes of Age: Some Maturation Problems and Proposals for Reform, 35 Rutgers L. Rev. 285, 311-24 (1983). Professor Johnson's piece in the Journal of Corporation Law is the most comprehensive and carefully written.

enforce federal law in RICO cases.

While expressly conceding that finding the existence of equitable relief was a plausible reading of RICO and that precluding parties from obtaining equitable relief, even where the prospect of irreparable harm is present, "hamstrings the statute's effect," the Court, nevertheless, ruled against Petitioners.

The consequence of the Ninth Circuit's decision is deeply troubling. A primary objective of RICO, to curtail organized crime, will be thwarted if petitioners are denied an effective preliminary vehicle to prevent the dissipation of assets pending judgment against such defendants. Ironically, it will be the "white collar" defendant, with established and visible assets, who

will present the better opportunity for satisfication of a judgment than the more elusive defendant associated with organized criminal activity or "fly by night" fraudulent schemes.

RICO's private enforcement mechanism was, of course, "intended by Congress... to encourage private enforcement of the laws on which RICO is predicated...[and to] provide strong incentives to civil litigants...in deterring racketeering." Alcorn County, Miss. v. U.S. Interstate Supplies, 731 F.2d 1160 at 1165 (5th Cir. 1984). The effect of the Ninth Circuit's decision will mean that relief will only be available by way of other parallel federal or state claims, hardly an attractive prospect. As a practical matter, those litigants and the courts may find themselves immersed in

increasingly complex RICO cases struggling over scope of relief and pendent state claims.

The implications of that prospect require examination. The existence of pendent party jurisdiction, for example, was termed a subtle and complex question in Moor v. County of Alameda, 411 U.S. 693, 713-16 (1973) (issue noted, but not resolved). The doctrine of pendent jurisdiction, too, is "a doctrine of discretion, not...right." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). No litigator will be able, therefore, to know in advance whether a particular court will choose to exercise it. Uncertainty will be the result, and in light of some district courts' hostility to RICO, that uncertainty may altogether too often be resolved by

throwing out the pendent claims. In such cases, parallel state suits designed to secure assets will result in complex parallel and split proceedings with numerous claim and issue preclusion complications.

Assuming, on the other hand, that the district court chooses to exercise pendent jurisdiction, or that another parallel federal claim or diversity jurisdiction is present, equitable jurisdiction will be exercised under a body of federal and state law that Congress has already found to be inadequate in the context of RICO-type claims. See, 84 Stat. 923 (1970) ("Sanctions and remedies...unnecessarily limited in scope and impact"); United States v. Turkette, 452 U.S. 576 at 586 (1981) (Because "state and federal

[law] was not adequate," Congress enacted RICO).

The result that would be obtained by an effort to obtain prejudgment attachment under Rule 64, Federal Rules of Civil Procedure, is not more attractive. Rule 64, of course, explicity excludes federal statutes like RICO. But where no federal statute is applicable, the matter is governed by state law. The availability of preliminary equitable relief varies widely from state to state, usually depending "upon each state's attitude toward the debtor - creditor relationship." 7 J. Moore & J. Lucas, Moore's Federal Practice, Para. 64.04 [3] at 64-13 (2d ed. 1948).

More than a little irony, too, accompanies these results. RICO's core

concern is, of course, with organized crime activities, even though it constitutes general reform that applies across the board. The government's experience with efforts to forfeit assets in organized crime type prosecutions is, therefore, illuminating. Even with the pre-verdict seizure orders of 18 U.S.C. §1963(b) or 21 U.S.C. §848(d), its success in seizing assets for forfeiture has been limited. See, e.g., Forfeiture of Narcotics Proceeds, Hearings before the Senate Subcomm. on Criminal Justice, Comm'n on the Judiciary, 96th Cong. 2nd Sess. 96-96, 114 (1980) (testimony of deputy assistant attorney general).

The specter of inconsistent results from case to case is also present. RICO's requirement of racketeering activity that may well extend across

state lines makes it that "unusual case" in which a claim may be thought to arise in more than one district. Leroy v. Great Western United Corp., 443 U.S. 173, 185 (1979). Under RICO's nationwide service of process and venue provisions, ample room will exist, therefore, for forum shopping by the skillful litigator to avoid the unfavorable law of a particular forum.

Accordingly, it is doubtful that a private party, who may be forced to wait until a verdict to secure his ability to execute his money damage award, will collect anything, or for that matter, even bother to sue in the organized crime area. Only skillful forum shopping, not the merits of his claim, will offer him much hope of success.

The Ninth Circuit's decision also

means that district courts will be unable to utilize injunctions to curtail ongoing continuing crime. "The target of [RICO] is ...not sporadic activity", Sedima, 105 S.Ct. at 3285 n.14. In cases where legitimate businesses have been infiltrated through a pattern of racketeering activity, a core concern of RICO, an award of treble damages is akin to compensating a victim for his suffering without curing the disease. The Ninth Circuit itself recognized:

> a private injunctive remedy would permit an injured party to put an immediate stop to racketeering behavior that threatens his or her business with economic destruction before the business has been brought to it's knees. While the treble damages remedy is a potent weapon, it necessarily assumes that economic injury has occurred. The preventive effect of injunctive relief is often a more just remedy.

796 F.2d at 1076.

In cases where the injury is irreparable, injunctive relief may be the only meaningful remedy. Congress cannot be believed to have denied this type of relief on a remedial statute whose provisions must be liberally construed.

II.

THE NINTH CIRCUIT'S DECISION CONCERNING THE AVAILABILITY OF PRIVATE INJUNCTIVE RELIEF WILL ADD TO THE CONFLICT AMONG THE COURTS

The Ninth Circuit characterized its decision against finding the availability of private equitable relief as "essentially" one of first impression. Nevertheless, the Courts of other Circuits have in fact expressed conflicting approaches to the issue, creating an increased climate of uncertainty for district courts and

litigants. This Court should grant certiorari to resolve this uncertainty.

The Ninth Circuit decided that district courts lack jurisdiction to issue private injunctive relief in civil RICO cases by finding that Section 1964(c), in setting out a remedy of damages and fees for private plaintiffs, carried with it "the negative implication [that] no other remedy was intended to be conferred." 796 F.2d at 1082-83 (emphasis in original). While the Ninth Circuit conceded that Section 1964(a) on its face supported a "plausible reading" that would find a basis for granting injunctive relief, the Court examined ambivalent instances in RICO's legislative history, the test of the Clayton Act, and subsequent sessions of Congress and concluded that Congress may

not have intended to provide equitable relief to private parties. The Court's approach was improper and mistaken. Legislative history should not be resolved to create an ambiguity. Nor should other statutes be similarly used. Such legislative history may only be used to vary the plain text of a statute when it is itself unequivocal.

In sharp contrast, the Second Circuit in Aetna Casualty Surety Co. v. Liebowitz, 730 F.2d (2d Cir. 1984), left intact the district court's preliminary injunction which was based on RICO [3/] in deciding whether private parties, who obtain preliminary injunctions and then settle the case, may recover attorneys fees. While the Court decided that they

3. Aetna Casualty and Surety Co. v. Liebowitz, 570 F.Supp. 908 (E.D.N.Y. 1983).

may not, it covertly observed that:

> ...once the Supreme Court handed down Bell v. Hood, 327 U.S. 678 (1946), which postdated the enactment of the Clayton Act, a specific statutory provision authorizing preliminary injunctive relief to maintain the status quo was no longer necessary, for in Bell v. Hood, the Court stated that 'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' 327 U.S. at 684.

730 F.2d at 909.

Similarly, in Bennett v. Berc, 685 F.2d 1053, 1064-65 (8th Cir. 1982) aff'd on rehearing, 710 F.2d 1361 (8th Cir. en banc), cert denied, 464 U.S. 1008(1983), the Eighth Circuit considered but did not decide, whether more than treble damages might properly be awarded under RICO. But without "endorsing or rejecting" the opinions expressed by legal writers, the Court determined that

such scholarship had concluded that equitable relief was available. On rehearing, while the issue remained unresolved, in a concurring opinion, Judge McMillian offered his judgment that equity-type relief was available. His analysis--and not that of the Ninth Circuit--is correct:

> [S]ection 1964(a) is a general grant of equitable power. It is not limited on its face or in its legislative history. Section 1964(b) grants the government authority to seek relief, an authority that it was necessary to set out lest old learning be used to circumscribe the new governmental power to seek equitable relief. Nothing in section 1964(b) speaks in negative terms about an authorization for private parties to seek similar relief. Indeed, the governmental suits are to be brought in behalf of private parties. No satisfactory explanation can be offered as to why Congress would have precluded victims from seeking help themselves. Section 1964(c) moreover, says "sue and" and not "sue to." The contrary argument would have to suggest that by adding the right to secure treble damage

> relief to the general right to sue Congress somehow manifested an intention to subtract the right to obtain other forms of relief. How addition might be converted with subtraction in a remedial statute that must be liberally construed strains even the legal imagination. Section 1964 ought to be read as authorizing both governmental and private suits to obtain equitable relief. To the degree that any ambiguity might be thought to exist in the choice of language, the liberal construction clause and the remedial purpose of the statute come down on the side of finding private suits to be authorized and that full relief can be granted. No satisfactory rationale can be offered, in short, to explain why a court ought to feel itself circumscribed in doing full justice for a victim under RICO.

710 F.2d 1365-66. 4/

In Dan River, Inc. v. Icahn, 701 F.2d at 278, (1983) the Fourth Circuit considered the issue of equity-type

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4. Quoting, 58 Notre Dame L.Rev. at 331-32 (footnote omitted); See, Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO); Basic Concepts-Criminal and Civil Remedies, 53 Temple L.Q. 1009, 1014, 1038 nn. 132-33 (1980).

relief in the context of its denial of an injunction in a corporate takeover battle. The Court expressed "substantial doubt" whether RICO included injunctive relief for private parties, although it did not "undertake to resolve the question." Id. It's doubt, however, was not based on an examination of the text of the statute, it's liberal construction clause, or it's legislative history, but on the Supreme Court's post RICO restrictive view on implying claims for relief, as expressed in Cort v. Ashe, 422 U.S. 66 (1975). The Ninth Circuit also applied a Cort v. Ash analysis concluding that a private right to equitable relief could not be implied.[5/]

The disharmony at the Circuit level

5. Neither Court, however, considered the application of Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 [Footnote Cont'd]

is also present among the district courts. The only three published decisions to expressly hold that injunctive relief is not available are all from the Northern District of Illinois. See, Miller v. Affiliated Financial Corp., 600 F.Supp. 987, 994 (N.D. Ill. 1984); DeMent v. Abbott Capital Corp., 589 F.Supp. 1378, 1382-83 (N.D. Ill. 1984) and Kaushal v. State Bank of India, 556 F.Supp. 576, 581-84 (N.D. Ill. 1983). See also, Ashland Oil, Inc. v. Gleave, 540 F.Supp. 81-86 (W.D.N.Y. 1982)

[Footnote 5 Cont'd]
U.S. 353 (1982) -- and its holding that the law in existence at the time of enactment of the legislation is controlling -- in considering whether a remedy should be held to be implicit in the statute. As such, both Courts missed the significance of this Court's most recent teaching in this area. See also, Herman and MacLean v. Huddelston, 459 U.S. 375 (1983); Daily Income Ford, Inc. v. Fox, 464 U.S. 523 (1984).

(statutory attachment not available to a private civil RICO plaintiff). Each of these cases, however, was decided prior to this Court's decision in Sedima.

In Chambers Development Co. v. Browning - Ferris Industries, 590 F.Supp. 1528, 1541 (W.D. Pa. 1984), however, the district court acknowledged that "courts are split as to whether or not a district court's equitable powers extend to private plaintiffs in RICO cases" and declined to strike a prayer for equitable relief. Id. at 1540. The Court expressed its belief that "the drafters of RICO intended for private claimants, as well as the Government, to benefit from the broader forms of relief in furtherance of the purposes of the Act..." Id. at 1541, and rejected the contrary opinions in Dan River, supra

and Kaushal, supra. Instead, the district court adopted the holdings of two district courts, which exercised inherent equitable powers to grant injunctive relief to private claimants in RICO cases. Marshall Field & Company v. Icahn, 537 F.Supp. 413 (S.D.N.Y. 1982); Vietnamese Fisherman's Association v. Knights of Ku Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981).

It is plain that considerable confusion and diversity of opinion exists in the lower courts as to whether they may provide equity relief to enforce RICO in private civil actions. As such, this Court should grant certiorari and resolve this important question.

III.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE RATIONALE OF THIS COURT'S RECENT HOLDING AND UNDERCUTS CONGRESSIONAL OBJECTIVES IN RICO CASE LITIGATION

To determine the scope of RICO, this Court has admonished the reader to look first to its language." United States v. Turkette, 452 U.S. 576 (1981); Russello v. United States, 464 U.S. 16, 20 (1983). A dispassionate reading of the language of Sec. 1964--as well as its liberal interpretation clause--in addition to this Supreme Court's recent mandate for a broad reading of RICO leads ineluctably to the conclusion that Section 1964 included equitable relief for private parties. Section 1964(a) is a general grant of equitable power limited

only by the district court's discretion. This Section ought to be read literally and applied in the unrestricted fashion its plain language demands.

The Ninth Circuit conceded that Sec. 1964(a) on its face appeared to provide a "plausible reading" that would support a basis for granting relief. Such a conclusion mandates that the analysis stop there. Basic and long established statutory construction rules require that such a plain reading of the statute be followed. In other words, the "language of [a] statute" is not only the "starting point" in ascertaining legislative intent, Lewis v. United States, 445 U.S. 55, 60 (1980), if unambiguous, such language must ordinarily be regarded as conclusive. United States v. Turkette, 452 U.S. at 580. Where

there is no ambiguity, there is no room for construction, and no reason to resort to legislative history, United States v. Wiltburger, 18 U.S. (5 Wheat) 76 (1820); Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980), or to turn to other statutes. Hamilton v. Rathbone, 175 U.S. 412, 421 (1849). The Ninth Circuit ignored these tenets of statutory construction. It ignored a plausible reading of the statute, despite the fact that no ambiguity is present.

Assuming that prior to its turning to RICO's legislative history, the Ninth Circuit could legimately determine that the statute was ambiguous, its analysis remains critically flawed. Like Judge Shadur's concession in Kaushal that RICO may be ambiguous on the point of equitable relief, such a finding must be

resolved, by virtue of RICO's express language that requires its "liberal" construction "to effectuate its remedial purposes." 84 Stat. 947 (1970). Resort to the legislative history to resolve the ambiguity is improper. In other words, the liberal construction clause is a rule of statutory construction based on the text of the statute itself that provides a basis for ascertaining legislative intent. As such, it ought to govern. See, Brown v. Barry, 3 U.S. (2 Dall.) at 367 ("intention of the legislature when discovered, must prevail [over] any rule of construction"). In RICO, Congress drafted a "carefully crafted statute." Iannelli v. United States, 420 U.S. 770, 789 (1975). Accordingly, if RICO's language is plain, it ought to control; if the language is ambiguous, that

construction which would "effectuate its remedial purposes" "by providing enhanced sanctions and new remedies" ought to be adopted. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923, 927 (1970).

Only by relying upon an unexpressed negative implication can the Ninth Circuit read the language of the Act to hold that the inclusion of one specific remedy for private litigants (treble damages in Sec. 1964(c)) might mean that no other remedy was intended for private plaintiffs. Yet this Court has decidedly rejected the application of the maxim of statutory construction, expressio unius est exclusio alterius, where it would undermine the statute's dominating remedial purpose. Herman v. Huddleston, 103 S.Ct. 683 (1983).

Moreover, the Ninth Circuit has its reasoning upside down. Express text must be found to deny, not to authorize equitable relief. Under a pure statutory construction analysis, therefore, it is presumed that all necessary remedies exist for the private plaintiff. This presumption can be rebutted only by an express contrary legislative intent. Under the negative implication analysis, on the other hand, the presumption is that no private equitable remedy exists. Thus, the presumption can only be rebutted by affirmative legislative intent that such a remedy should be found. The proper approach is, in short, that the remedy is present unless it is clearly withheld, either as a matter of a fair construction of the text or a clear import of the legislative history. The

burden lies on he who would restrict the availability of the power of a court to do justice to show that Congress had expressly withheld it. The presumption, which causes close cases to be resolved in favor of the power, not against it, is that the power is present. 6/ A "negative implication" derived from the grant of treble damages and fees is neither a clear nor an express

6. See generally, Califano v. Yamasaki, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.") (citing Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers...are available...") and Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4,11 (1942) ("Congress would not, without clearly expressing such a purpose, deprive...[a court] of its customary power....*** [D]enial of such power is not to be inferred...[from silence] *** Where Congress wish[es] to deprive the courts of...historic power, [Footnote Cont'd]

withholding of equitable relief by Congress.

In its search of RICO's legislative history for evidence that Congress did not intend to provide the private injunctive relief, the Ninth Circuit found two "episodes" particularly

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[Footnote 6 Cont'd]
it [knows] how to use apt words."); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969) ("existence of all necessary and appropriate remedies."); Jones v. Mayer Co., 392 U.S. 409, 414 n. 13 (1968) ("The fact that 42 U.S.C. Sec. 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy"); Porter v. Warner Holding Co., 318 U.S. 395, 398 (1946) ("Unless a statute words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."); Texas & N.O.R. Co. v. Brotherhood of R. & S.S. Clerks, 281 U.S. 548, 570 (1930) ("The right is created and the remedy exists.") (citing Marbury v. Madison, 7 U.S. (1 Cranch 137, 162-63 (1803)).

convincing:

> First, the House rejected an amendment, described as an additional civil remedy which would expressly permit private parties to sue for injunctive relief under section 1964(a). Second, in the very next year after RICO's enactment, Congress refused to enact a bill to amend section 1964 and give private plaintiffs injunctive relief.

796 F.2d 1085.

The amendment referred to by the Court was introduced by Representative Steiger, however the Court misread the House floor interchange between Congressman Poff and Steiger. 796 F.2d at 1085-86. Congressman Steiger's amendment included, inter alia, a separate section for private equity relief, different language dealing with amount in controversy, intervention by the Attorney General, non-mutual estoppel, and a statute of limitations.

The amendment was withdrawn, not defeated. It was not, moreover, limited to the question of equitable relief. Congressman Steiger noted, too, at the time under "the bill as it now stands [innocent victims]...may have [the] option to obtain proper redress." 116 Cong. Rec. 35, 349 (1970) (emphasis added). Congressman Poff, too, spoke of the treble damage claims as "in addition" to the power of the court to do equity. 116 Cong. rec. 35, 395 (1970). As such, the ruling of the Ninth Circuit is inconsistent with the plain language of the RICO statute, principles of statutory construction on the legislative history of the Act, and it's underlying policy considerations; moreover, it conflicts with rulings in other circuits, the Act's liberal construction clause, and this

Court's Mandate in Sedima.

The second legislative episode cited by the court is the failure of the House to pass S.16 the following year which contained provisions expressly authorizing private injunctive relief. S.16, however, included numerous other provisions and the Ninth Circuit points to no particular evidence that would indicate that the failure of the House to pass S.16 was in any way related to the injunctive relief provision.

The Court's conclusion, however, highlights rather than resolves the perceived ambiguity in the legislative history. As the Supreme Court has observed, contradictory or ambiguous legislative material "should not be permitted to control the customary meaning of words," NLRB v. Plasterer's

Local, 404 U.S. 116, 129 n.24 (1971). In any event, as the Supreme Court restated in a RICO criminal case, Russello v. United States, 104 S. Ct. 296 (1983), "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (Quoting Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 103 S.Ct. 1011, 1020 n.27 (1983).)

Assuming arguendo that the legislative history is ambiguous, the court, as a matter of statutory construction, ought not have used it to resolve supposed ambiguity in the language of the text. It should have relied on the compelling policy considerations and RICO's remedial purposes to find a private right to injunctive relief. As it stands, the

Ninth Circuit's decision gives rise to the profoundly disturbing, but inevitable situation where there will be a right without an adequate remedy. Accordingly, based on the conflict regarding the interpretation of RICO and the overall importance of this national issue, Petitioners respectfully urge this Court to grant Certiorari.

IV.

PETITIONERS' TRADE SECRET CLAIM AND GOVERNING CONSTITUTIONAL PROVISIONS AND STATUTES

The Ninth Circuit also ruled that religious materials, merely because they are owned by non-profit religious organizations, are not entitled to the protection afforded by the California trade secrets statute. By so holding, the Ninth Circuit has effectively denied

Petitioners' Fifth and Fourteenth Amendment rights to due process and equal protection of the law.

Petitioners believe that through a process called "auditing", unwanted barriers that inhibit, stop, or blunt a person's natural abilities are removed. Petitioners believe that auditing increases a person's abilities so that he becomes more able and his survival, happiness, and intelligence are increased. The auditing process involves the application of the "religious technology" and "advanced religious technology" of the Petitioners, the higher levels of which contain certain confidential information which is carefully protected from disclosure and is protected as a trade secret. It is these higher level materials which were

stolen and were in the possession of the Defendants.

As noted by the Ninth Circuit, before 1985 California trade secret law was based on the Restatement of Torts 737, comment (b) (1939).

The leading California case prior to the present legislation adopted verbatim the Restatement's definition of trade secret:

> It is now settled that a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

Sinclair v. Aquarius Electronics, Inc., 42 Cal. App. 3d 216, 221, 116 Cal. Rptr. 654, 658 (1974) (emphasis omitted); See also, Chicago Lock v. Fanberg, 676 F.2d 400, 404 (9th Cir. 1981). The Restatement (Second) of

Torts omitted Section 757 and any reference to trade secrets. In response, a Uniform Trade Secrets Act was drafted. California adopted this Uniform Act, with minor changes, in 1985. See, Appendix C, 86.

The District Court concluded that the Petitioners' confidential materials met the definition of a trade secret. The Court stated:

> Now I think that the Court can definitely say that under the definitions that the Court is required to follow with respect to trade secrets, if you look at Clark v. Bunker, which is one of the cases that we were looking at earlier, you will find that it meets that definition of trade secrets. It meets the definition of a trade secret under 10 cases in the Ninth Circuit.

The District Court, after carefully examining all the evidence, found that Plaintiffs' confidential materials had been stolen and that Defendants were in

possession of and made use of such materials for their own pecuniary gain. The preliminary injunction prohibited Defendants from possessing, using, and disseminating the stolen confidential materials.

V.

THE CALIFORNIA TRADE SECRETS ACT AS INTERPRETED BY THE NINTH CIRCUIT VIOLATES PETITIONERS' FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION RIGHTS.

As previously noted, this Court has held that "neutral principles of law" are to be applied to resolve Church property disputes. See, Jones v. Wolfe, 443 U.S. 595 (1979). This Court has also recognized that trade secrets constitute property protected by the Fifth and Fourteenth Amendments.

Ruckelshaus v. Monsanto Co., 104 S.Ct. 2862 (1984); See also, St. Michaels Convalescent Hospital v. California, 643 F.2d 1396 (9th Cir. 1981). By interpreting the California Trade Secrets Act to mandate that all other entities except religious organizations are entitled to the protection afforded by the Act, the Ninth Circuit has now denied Petitioners the right to hold and protect property in the nature of trade secrets. Petitioners submit that such a denial of access to the protection afforded by purely secular laws, merely because Petitioners are religious non-profit organizations, constitutes a violation of Petitioners' Fifth and Fourteenth Amendment rights to due process and equal protection.

The equal protection clause requires a state to treat alike all persons who

are similarly situated, in the absence of sufficient justification for differences in treatment. The equal protection clause is directed to every form of state action--legislative, executive or judicial. Ex Parte Virginia, 100 U.S. 339, 347, 25 L.Ed. 676 (1880).

The unequal application of a state law, fair on its face (e.g. the California Trade Secrets Act) has long been viewed as a denial of equal protection. In Yick Wo v. Hopkins, 118 U.S. 356, 373-374, 6 S.Ct. 1064, 1073(1886), the Court stated:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution...

In the instant case, the Ninth Circuit has made a classification of the persons entitled to the benefits of the California Trade Secrets Act. The Ninth Circuit has held that Petitioners, because they are religious non-profit organizations, cannot maintain an economic advantage over others and thus cannot claim the protection afforded by the trade secrets statute. However, the Act is neutral on its face as to the persons and/or entities entitled to its protection. Indeed, 3426.1 (c) of the statute defines "persons" as a "natural person... or any other legal or commercial entity" (See appendix C, 86). Petitioners, as legal entities, clearly lie within the purview of the statute's protection. The Ninth Circuit's arbitrary classification, is subject to "strict scrutiny" and cannot be upheld

unless shown to serve a "compelling governmental interest." See, Pyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 2394-96, 72 L.Ed. 786 (1982).

Petitioners will be prohibited from enjoining the continuing misappropriation and misuse of materials obtained by theft merely because they are religious organizations. This arbitrary distinction serves absolutely no governmental interest and simply defies logic.

The Ninth Circuit has lost sight of this distinction and ruled that because Petitioners are religious entities they cannot maintain an economic advantage and thus are not entitled to protection that is enjoyed by all other legal or commercial entities.

Notwithstanding the fact that Scientology is a religion and its

churches, including the Petitioners herein, are engaged in religious activities, there remains the fact that Scientology, like any other religion, must exist in an economic environment in order to survive. Churches exist financially by receiving donations and by then managing those donations in such a way as to increase the financial viability and ensure its economic survival. All the principles of economics normally associated with the business community apply.

This Court stated in Murdock v. Pennsylvania, 63 S.Ct. 870(1943):

> "But the mere fact that the religious literature is "sold"... rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project.

Id. at 874.

There can be no question that non-profit organizations can own property and derive economic advantages. The Fourth Circuit's holding in the case of Purcell v. Summers, 145 F.2d 979 (4th Cir. 1944). is most illustrative on this point and has been cited with approval by the Ninth Circuit Court of Appeals in United States Jaycees v. San Francisco's Junior Chamber of Commerce, 513 F.2d 1226 (9th Cir. 1975). In Purcell, the Fourth Circuit held that the law of unfair competition applies with equal force to both religious organizations and for-profit businesses. That Court stated:

> "We have no doubt that these principles of [unfair competition] ordinarily applied in the case of business and trading corporations are equally applicable in the cases of churches and other religious and charitable organizations; for, while such organizations exist for the

> worship of Almighty God and for the purpose of benefiting mankind and not for the purposes of profit, they are nevertheless dependent upon the contributions of their members for means to carry on their work, and anything which tends to divert membership or gifts of members from them injures them with respect to their financial condition is the same way that a business corporation is injured by diversion of trade or custom...We are aware that churches are established for the promulgation of faith under the regulations of definite religious organizations, but we are also aware that such organizations, through some administrative channels, own property, real and personal, and require funds to carry on their purposes. These funds come from contributions, gifts, donations, and bequests. No large church organization could live by faith alone and if its income were stopped or substantially reduced, its scope for spreading its religion, as enunciated by its doctrines, would be seriously hampered.

Id. at 985 (emphasis added).

Thus, Purcell recognizes that the existence of any religious organization

is, of necessity, dependent upon a financial basis just like a for-profit business. Petitioners, like other religious non-profit organizations, depend on contributions, gifts, donations and bequests to carry out their religious purposes. Specifically the religious services delivered by the Petitioners, for which a fixed donation is made are those services delivered utilizing the confidential materials at issue in this case. Indeed, these fixed donations are petitioners' main source of income. These funds are then managed by Petitioners' in such a manner so that they are financially viable and expanding.

The Ninth Circuit concluded that Purcell does not apply in the instant case because this case involves trade

secrets, while Purcell involved trade names. However, trade name as well as trade secret protection has long been recognized, even by the Ninth Circuit, as just one of the many aspects encompassed by the concept of unfair competition. In Chicago Lock Co. v. Fanberg, 676 F.2d 400 (9th Cir. 1981), the Ninth Circuit stated:

> Commission of the common law tort [of trade secret misappropriation] is enjoinable under the purview of unfair competition.

Id. at 404. 7/

The "trade" in trademark or trade name is the same "trade" as found in trade secret. The rationale for trademark, trade name and trade secret

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7 See also, Pachmayr Gun Works, Inc. v. Olin Matheson Chem. Corp., 502 F.2d 802 (9th Cir. 1974); Engelhard Industries, Inc. v. Research Instrumental Corp., 324 F.2d 347 (9th Cir.1963); Architectural Models, Inc. [Footnote Cont'd]

protection, all of which are protected under the laws of unfair competition, is exactly the same. This rationale is reflected by the Court's statement in Purcell that:

> In all [cases of unfair competition] there is involved the element of fraudulent attempt of someone to 'reap where he has not sown' and to appropriate to himself 'the harvest of those who have sown.' 145 F.2d at 987.

The Ninth Circuit's decision is in direct conflict with this rationale.

To allow the decision to stand will mean that anyone can steal confidential materials from any religious organization without civil restraint. This simply

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[Footnote 7 Cont'd]
v. Neklason, 264 F.Supp. 312 (N.D. Cal. 1967); Grove Press, Inc. v. Collectors Publication, Inc., 264 F.Supp. 603 (C.D. Cal. 1967); Barquis v. Merchants Collection Association, 7 Cal. 2d 94, 95, 496 P.2d 625,627 (1957); 2 Callman Unfair Competition, Trademarks, and Monopolies, Section 14.01 N. 6.

does not conform with the laws of unfair competition and is a clear denial of Petitioners due process and equal protection rights. Accordingly, Petitioners seek a Writ of Certiorari from this Court to review the Ninth Circuit's first impression ruling that Petitioners, merely because they are religious organizations, cannot maintain an economic advantage and are thus not entitled to the protection of California Trade Secrets Act and the laws of unfair competition. Such an arbitrary distinction based on the suspect classification of religion violates Petitioners' rights to due process and equal protection of the law.

VI

THE CALIFORNIA TRADE SECRET STATUTE AS INTERPRETED BY THE NINTH CIRCUIT VIOLATES PETITIONERS' FIRST AMENDMENT RIGHTS.

The Ninth Circuit has held that a religion, cannot maintain an economic advantage and "[i]ndeed, to do so would raise grave doubts about its claim as a religion and a not-for-profit corporation." As shown above, such a distinction has no basis in law, is in direct conflict with this Court's holding in Murdock v. Pennsylvania, supra, and denies Petitioners due process and the equal protection of the law.

By so ruling as a matter of law that the protection afforded by the California Trade Secret Act does not extend to materials owned by religious organiza-

tions, the Ninth Circuit has effectively destroyed Petitioners' First Amendment right to freely practice their religion.

A law which disqualifies one from an otherwise available right, simply because of ones religious status, violates the First amendment unless there is an overriding governmental interest. McDaniel v. Paty, 98 S.Ct. 1322 (1978); Bob Jones University v. United States, 103 S.Ct. 2017 (1983). Moreover, this Court has long recognized that a statute which is neutral in its face can be applied in a way that is violative of First Amendment guarantees. Wisconsin v. Yoder, 92 S.Ct. 1526 (1972); Sherbert v. Vernon, 83 S.Ct 1790 (1963).

In the instant case, Petitioners believe that the confidential materials at issue have to be delivered to their

parishioners in a very exact prescribed manner as set out in the Scientology scriptures. These scriptures mandate that only those individuals who have completed the appropriate prerequisite services may be exposed to the confidential materials at issue.

The Ninth Circuit's decision, if allowed to stand, will inevitably result in the public dissemination and uncontrolled supervision of the confidential materials which violates Petitioners' religious beliefs. The Court's decision directly effects the manner in which Petitioners' religious beliefs are disseminated. See, Negre v. Larsen 91 S.Ct. 828(1971).[8/]

Therefore the Ninth Circuit's

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8 McDaniel v. Paty, 98 S.Ct. 1322(1978); Fowler v. Rhode Island, 73 S.Ct. 526 (1953); Follett v. Town of McCormick, 64 S.Ct. 717 (1944).

decision constitutes a violation of Petitioners first amendment rights to the free exercise of their religion.

Additionally, such an interpretation of the Trade Secret Act violates First Amendment establishment clause protections set forth in the three prong test of Lemon v. Kurtzman, 403 U.S. 602 (1971):

> First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statue must not foster an excessive government entanglement with religion.

Id. at 612 (emphasis added); See also, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

The California Trade Secrets Act as interpreted by the Ninth Circuit clearly

fails the second portion of the Lemon test in that it inhibits Petitioners' free exercise and establishment of their religion.

CONCLUSION

The petition for certiorari should be granted for the reasons stated above.

DATED: January 5, 1987

Respectfully submitted,

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